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In the Supreme Court of the United States

OCTOBER TERM, 1982

CARL BRIGGS, ET UX. AND RAYMOND J. HURBI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Drake v. *Commissioner*, 52 T.C. 842 4

Interstate Transit Lines v. *Commissioner*, 319 U.S. 590 5

M.F.A. Central Cooperative v. *Bookwalter*, 427 F.2d 1341, cert. denied, 405 U.S. 1045 6

Pevsner v. *Commissioner*, 628 F.2d 467, rehearing denied, 636 F.2d 1106 5

Sparkman v. *Commissioner*, 112 F.2d 774 4

United Stataes v. *Mississippi Chemical Corp.*, 405 U.S. 298 6

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section 83 (& Supp. V) 6
Section 162 (& Supp. V) 6
Section 162(a) (& Supp. V) 1, 3, 6
Section 262 3
Section 501(c)(5) 6
Section 501(c)(5) 6
Section 6110(j)(3) 6

Page

Miscellaneous:

1 B. Bittker, *Federal Taxation of Income, Estates & Gifts* (1981) 6

I.T. 2888, 14-1 Cum. Bull. 54 (1935) 4

Rev. Rul. 57-130, 1957-1 Cum. Bull. 108 5

Rev. Rul. 62-17, 1962-1 Cum. Bull. 87 6

Rev. Rul. 72-463, 1972-2 Cum. Bull. 93 ..... 4, 6

Rev. Rul. 78-128, 1978-1 Cum. Bull. 39 4

Rev. Rul. 81-192, 1981-2 Cum. Bull. 50 4

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the decision below[2] in this federal income tax case holding that the portions of their union dues that were allocated to construction of recreation centers, and to a building fund (in return for which petitioners received conditionally redeemable "building fund owners certificates"), were not deductible as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)).

The pertinent facts may be summarized as follows: Petitioner Briggs, during 1975 (the taxable year at issue with respect to him), was employed in Anchorage, Alaska. Petitioner Hurbi, during 1976 (the taxable year at issue with

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[1]References to "petitioners" are to Carl Briggs and Raymond J. Hurbi. Ruth Briggs is a party to this case solely because she filed a joint return with Carl Briggs for 1975.

[2]The decision of the court of appeals is reported at 694 F.2d 614.

respect to him), was employed 70 miles from Fairbanks, Alaska. As a condition of their employment, petitioners had to be members in good standing of Local 959 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. To remain in good standing with Local 959, petitioners were required to pay specified monthly and hourly dues. The hourly dues, which are the only ones involved in this case, were deducted by the employers from the members' paychecks and remitted directly to the union (Pet. App. A-6 to A-7).

In 1974 and 1975, the employees of the companies for whom petitioners worked approved new collective bargaining contracts calling for, *inter alia*, a 15-cent increase in hourly union dues, to be used for construction of recreation centers in Anchorage and Fairbanks (Pet. App. A-9 to A-10). The centers were completed in 1977 at a cost of approximately $15 million, of which approximately $5 million had been paid directly by the union, and approximately $10 million had been borrowed. Each center was equipped with a swimming pool, tennis courts, handball courts, steamrooms, saunas, and other facilities (Pet. App. A-10).

Local 959 also used some of the hourly dues for its building fund plan. Under this plan, each union member paid 3 cents per hour into a fund to be used for the construction of union buildings, and received in exchange a "building fund owners certificate" in the face amount of $50 for each $50 he had so paid. Although generally nontransferable, this certificate could be redeemed at face value when the member died or withdrew from the union under honorable circumstances, and could be redeemed with interest (at a then-unspecified rate) at the completion of the union's building program (Pet. App. A-7 to A-9).

In 1975, petitioner Briggs paid $474 that was allocated to the recreation centers, and $95 that was allocated to the building fund. In 1976, petitioner Hurbi paid $285 that was

allocated to the recreation centers, and $57 that was allocated to the building fund. Petitioners deducted these sums on their tax returns as business expenses (Pet. App. A-11 to A-12). On audit, however, the Commissioner disallowed these deductions (Pet. App. A-12 to A-13).

In this proceeding brought by petitioners for redetermination of the deficiencies, the Tax Court upheld the Commissioner (Pet. App. A-5 to A-32). With respect to the dues allocated to the construction of the recreation centers, the Tax Court found that they "were used for the personal benefit of the union members in the aggregate, and * * * not * * * to carry out [the union's] responsibilities for the maintenance of the members' employment or for the improvement of their conditions of employment" (Pet. App. A-32), and thus held that they did not constitute ordinary and necessary business expenses. With respect to the building fund dues, the Tax Court held that because petitioners had received valuable certificates in return for those dues, they constituted nondeductible capital expenditures (Pet. App. A-14 to A-25). The court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that the portion of petitioners' union dues allocated to the construction of recreation centers was not deductible.

Section 162(a) of the Internal Revenue Code of 1954 (& Supp. V) allows as a deduction "all the ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business * * *," and Section 262 of the 1954 Code prohibits any deduction for "personal, living, or family expenses." Under these provisions, a taxpayer's expenditures for improvement of his personal appearance or physical condition are personal expenses, and thus nondeductible,

even where they arise from a job-related requirement.[3] It is therefore plain that the recreation center dues here, which were assessed by the union for the purpose of constructing athletic facilities for the after-hours diversion of its members, constitute nondeductible personal expenditures.

Petitioners contend (Pet. 12-17) that it was unlikely that petitioner Hurbi would ever use the facilities, because he lived a significant distance from either one,[4] and for that reason alone Hurbi should have been allowed his claimed deduction. But it is the union's purpose in making the expenditures in question, and the relation of that purpose to the members' performance of the duties of their employment, that controls the question of deductibility (see I.T. 2888, 14-1 Cum. Bull. 54, 56 (1935), position restated in Rev. Rul. 72-463, 1972-2 Cum. Bull. 93). Here, it is clear that the union's purpose was to confer a personal, non-job-

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[3]See *Sparkman* v. *Commissioner*, 112 F.2d 774, 777-778 (9th Cir. 1940) (denture expenses of an actor held nondeductible, although his purchase of the dentures was necessitated solely by his employment as an actor); *Drake* v. *Commissioner*, 52 T.C. 842 (1969) (haircut expenses of a soldier held nondeductible, although his frequent haircuts were necessitated by the Army's requirement that he have a haircut every two weeks); Rev. Rul. 78-128, 1978-1 Cum. Bull. 39 (health spa expenses incurred by a law enforcement officer held nondeductible, although one of the requirements of his job was that he maintain excellent physical condition). See also Rev. Rul. 72-463, 1972-2 Cum. Bull. 93 (portion of union members' dues used to provide funds for payment of death benefits is not deductible because it serves to defray an expense of a personal nature); Rev. Rul. 81-192, 1981-2 Cum. Bull. 50 (amounts withheld from employees' wages to fund private disability benefits plans are nondeductible personal expenses, even though the withholding was mandatory).

[4]In 1976, the tax year at issue with respect to Hurbi, he was stationed 70 miles from Fairbanks (Pet. App. A-7). In 1977, the year the recreation centers were completed, Hurbi was stationed at Sparrevohn, 200 miles from Anchorage (Pet. 6).

related benefit on its members (Pet. App. A-32). Accordingly, the recreation dues involved here were nondeductible, and the Commissioner was not required to make an exception for each union member who contended that he was unable to take advantage of the recreation centers that the union was building on its members' behalf. Cf. *Pevsner* v. *Commissioner*, 628 F.2d 467 (5th Cir. 1980), rehearing denied, 636 F.2d 1106 (5th Cir. 1981) (boutique manager's required expenditures for purchase of designer clothing, adaptable for general wear, held nondeductible, although manager, because of her "simple everyday lifestyle," in fact never wore the clothing outside of work).

Petitioners also contend (Pet. 11-12) that since workers whose employers build recreational facilities on their behalf are allegedly not taxed on their proportionate share of the value of those facilities, then, in order to achieve parity of tax treatment between those workers and workers who (through their union) build similar facilities themselves, the latter workers should be entitled to deductions for the sums they pay out for the construction of those facilities. But even assuming that petitioners are correct that where an employer builds elaborate athletic facilities for his employees, the employees are not required to include any amounts in respect thereof in gross income,[5] that fact does not help petitioners' case. Here, petitioners are seeking a *deduction* — not defending against the assertion by the Commissioner of additional gross income. In these circumstances, the taxpayer has the burden of "clearly showing" his right to a deduction. *E.g., Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593 (1943). Thus, the fact that workers with employer-provided athletic facilities might not have to

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[5]But cf. Rev. Rul. 57-130, 1957-1 Cum. Bull. 108 (amount paid by employer for "reconditioning and health-restoring services" rendered by resort hotel to his employee is includable in employee's gross income).

include any amounts in respect of those facilities in gross income has no bearing on the petitioners' claimed deductions here. See 1 B. Bittker, *Federal Taxation of Income, Estates & Gifts* para. 14.1 (1981) ("Fringe benefits that are excluded [from income] under de minimis practice would not be deductible if purchased by employees for themselves * * *").[6]

2. The decision below also correctly held that the portion of petitioners' dues allocated to the building fund was not deductible. As the Tax Court found (Pet. App. A-18), the certificates received by petitioners in exchange for their building fund dues were distinct assets that had substantial ongoing value. Their cost (*i.e.*, the total amount of the building fund dues paid by petitioners) was therefore nondeductible. See *United States* v. *Mississippi Chemical Corp.*, 405 U.S. 298 (1972); *M.F.A. Central Cooperative* v. *Bookwalter*, 427 F.2d 1341 (8th Cir. 1970), cert. denied, 405 U.S. 1045 (1972).[7]

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[6]As petitioners note (Pet. 6, 9, 12), the Internal Revenue Service, in a technical advice memorandum, has ruled that the union's proposed funding and operation of the recreation centers involved here would not jeopardize its status as a labor organization exempt from tax under Section 501(c)(5) of the 1954 Code. Section 501(c)(5) is not in pari materia with Section 162(a) (& Supp. V) (compare Rev. Rul. 62-17, 1962-1 Cum. Bull. 87 (labor organization may, consistent with its Section 501(c)(5) exemption, pay death benefits to its members), with Rev. Rul. 72-463, 1972-2 Cum. Bull. 93 (individual labor union members may not deduct under Section 162 (& Supp. V) the portion of their union assessments that is used to provide funds for the payment of death benefits)). Thus, the Revenue Service's technical advice memorandum has no significance for purposes of the present case. See also, Section 6110(j)(3).

[7]Section 83 of the 1954 Code (& Supp. V), relied on by petitioners (Pet. 19), is inapposite. It deals with the inclusion in gross income of property transferred in connection with the performance of services, and has nothing to do with deductions by employees.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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